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No. 07-1005

In the Supreme Court of the United States

INDU GULATI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court of appeals lacks jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) to review an immigration judge's denial of an alien's request to continue removal proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter* but is available at 2007 WL 2988632. The decisions of the Board of Immigration Appeals (Pet. App. 8a-10a) and the immigration judge (Pet. App. 11a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2007. A petition for rehearing was denied on December 27, 2007 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on January 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

b. The Attorney General has promulgated regulations that provide rules of procedure for administrative removal proceedings, in order to "assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. 1003.12. Under those rules of procedure, if an alien seeks a continuance of proceedings, "[t]he Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. 1003.29; see 8 C.F.R. 1240.6 ("After the commencement

of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.").

"The grant of a continuance is within the [immigration judge's] broad discretion." *Zafar* v. *United States Attorney Gen.*, 461 F.3d 1357, 1362 (11th Cir. 2006). To obtain reversal by the Board of Immigration Appeals (BIA) of the denial of a continuance by an immigration judge (IJ), an alien must show "that the denial caused [her] actual prejudice and harm and materially affected the outcome of [her] case." *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006) (quotation marks omitted).

c. The Attorney General has discretion to adjust an alien's status to that of a lawful permanent resident under certain circumstances. 8 U.S.C. 1255 (2000 & Supp. V 2005). Most directly relevant here is Section 1255(i), which permits the Attorney General to grant adjustment of status to certain "grandfathered" aliens who are unlawfully present in the United States, but were "the beneficiary * * * of * * * an application for a labor certification under [8 U.S.C.] 1182(a)(5)(A) * * * that was filed pursuant to * * * regulations [issued by] the Secretary of Labor on or before" April 30, 2001. 8 U.S.C. 1255(i)(1)(B)(ii); see 8 C.F.R. 1245.10.

Adjustment of status through labor certification is a "long and discretionary process." *Ahmed* v. *Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006). First, a potential employer must file a labor certification application on an alien's behalf, which must establish, *inter alia*, that there is no United States citizen available to fill the job. *Khan* v. *Attorney Gen. of the United States*, 448 F.3d 226, 228 n.2 (3d Cir. 2006). Second, if the labor certifica-

tion application is approved by the Department of Labor, the prospective employer must submit the approved labor certification, along with an employment-based visa petition (Form I-140), to the Department of Homeland Security (DHS). See 8 C.F.R. 204.5(a) and (a)(2). Third, if the employment-based visa petition is approved, the alien must apply for adjustment of status. See 8 C.F.R. 1245.2(a)(2); *Khan*, 448 F.3d at 228 n.2 (describing the "three-step process" required for an alien to attain employment-based permanent residency under Section 1255(i)). In this third and final phase, the alien must demonstrate that he satisfies the basic statutory eligibility requirements for adjustment of status under 8 U.S.C. 1255(a)—*i.e.*, that he "is eligible to receive an immigrant visa and is admissible to the United States for permanent residence," and that "an immigrant visa is immediately available to [him] at the time the application is filed." 8 U.S.C. 1255(i)(2).

d. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1). Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal under 8 U.S.C. 1182(a)(9)(A). See 8 C.F.R. 1241.7 (providing that "an alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated

with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

To qualify for permission to depart voluntarily at the close of removal proceedings, an alien must satisfy certain statutory conditions, including "establish[ing] by clear and convincing evidence that he has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D). Even if those conditions are satisfied, the decision whether to permit an alien to depart voluntarily is discretionary with the Attorney General. See *e.g.*, *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); see generally 8 U.S.C. 1229c (2000 & Supp. V 2005).

The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The INA strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). An IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and the alien becomes "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including adjustment of status under 8 U.S.C. 1255 (2000 & Supp. V 2005). See 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005); 8 C.F.R. 1240.26(a).

Finally, the INA contains a number of provisions addressing judicial review of voluntary departure orders

and the alternate orders of removal that accompany them. Congress has provided that, "[n]otwithstanding any other provision of law * * * no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under [the voluntary departure provision]." 8 U.S.C. 1252(a)(2)(B)(i) (2000 & Supp. V 2005). Another provision states that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure, * * * nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." 8 U.S.C. 1229c(f). Compare 8 U.S.C. 1252(b)(3) (authorizing reviewing court to "stay * * * removal" pending its decision on petition for judicial review of order of removal).

2. Petitioner, a native and citizen of India, was admitted to the United States in 1997 as a non-immigrant visitor with authorization to remain in the United States until May 7, 1998. Pet. App. 11a. Petitioner failed to depart the United States as required, and has remained in this country ever since. *Ibid.*

3. a. On August 24, 2004, DHS charged petitioner with being removable for remaining in the United States longer than permitted by her visa. Pet. App. 11a-12a.

On October 27, 2004, petitioner appeared for a removal hearing before an IJ. Pet. App. 12a. At that hearing, petitioner's counsel informed the IJ that petitioner believed that she was eligible for adjustment of status under the grandfathering provision in 8 U.S.C. 1255(i) "based upon a prior labor certification" application, and that petitioner was attempting to get a different employer to file a new labor certification application on her behalf. A.R. 51-52; Pet. App. 12a-13a. The IJ granted a continuance "for attorney prep[aration],"

A.R. 51, specifically instructing petitioner to be prepared at the next hearing to demonstrate not only that she had been the beneficiary of a pre-April 30, 2001 labor certification application, but also that the application was approvable when filed. A.R. 52.

Because of scheduling delays, petitioner's next hearing was not held until June 16, 2005, more than seven months after the initial hearing. Pet. App. 12a, 16a-24a. At that hearing, petitioner conceded removability, *id.* at 12a, 18a, but asked the IJ to grant a further continuance, *id.* at 20a. Petitioner submitted an "ACKNOWLEDGMENT LETTER" from the State of California stating that it had "received [an] APPLICATION FOR ALIEN EMPLOYMENT CERTIFICATION" filed on petitioner's behalf, and that the application had a "[p]riority date [of] 4/30/2001." A.R. 71; see Pet. App. 18a. Petitioner informed the IJ, however, that the employer who had filed that application was no longer in business and that she no longer had a pending job offer from that employer. *Id.* at 19a. Petitioner stated that she was "in the process of" arranging for a new labor certification application based on a job offer in Illinois, but she acknowledged that the application had been neither filed nor approved. *Id.* at 20a. Petitioner also informed the IJ that her son had applied to become a lawful permanent resident based on his marriage to a United States citizen. *Id.* at 18a.

The IJ denied petitioner's request for a continuance. Pet. App. 13a-15a, 21a. "[O]n the basic facts presented," the IJ stated, "this Court does not find * * * that [petitioner] is even * * * eligible" for grandfathering

under Section 1255(i). *Id.* at 14a.[1] The IJ further remarked that, "[e]ven if [petitioner] is * * * eligible" for grandfathering, there was no currently pending labor certification and "no evidence" that such an application would be "prima facie approvable." *Ibid.* The IJ also stated that it was "speculative to conclude that [petitioner] will be eligible for permanent resident status through her son in the near future." *Id.* at 13a. Finally, the IJ stated that, even if he otherwise had the power to grant a continuance, he "would deny a continuance of this case solely in the exercise of discretion," *id* at 14a, because of petitioner's "flagrant[] violat[ion of] the immigration laws of the United States," *id.* at 13a. The IJ did, however, grant petitioner's request for voluntary departure. *Id.* at 15a.

b. Petitioner filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus suspending both the voluntary departure period and the alternate order of removal pending appeal. 8 U.S.C. 1101(a)(47)(B)(i) and (ii) (order "become[s] final" upon affirmance by the BIA or expiration of time for seeking BIA review); 8 U.S.C. 1229c(b)(1) (authorizing the Attorney General to permit voluntary

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[1] At the hearing before he rendered his oral decision, the IJ had stated:

> I'm not deciding whether [petitioner] has [Section 1255(i)] eligibility or not. You would have to show that this is an approvable filing. And I don't know if this is a valid company connection to [petitioner], [because] thousands of people went out and filed applications on April 30, 2001 to be grandfathered in without any real plans to accept those job offers. So, at this time, I'm not even deciding the [Section 1255(i)] eligibility issue. * * * But I'm not going to grant a continuance based upon speculation.

Pet. App. 20a-21a.

departure "at the conclusion of a [removal] proceeding under section 1229a").

On July 21, 2006, the BIA entered an order "adopt-[ing] and affirm[ing]" the IJ's decision in relevant part. Pet. App. 8a-10a. The Board granted petitioner "60 days from the date of this order," that is, until September 19, 2006, to depart voluntarily from the United States. *Id.* at 9a.

4. a. On August 17, 2006, petitioner filed a petition for review with the United States Court of Appeals for the Seventh Circuit. On September 5, 2006, petitioner filed with the court of appeals a motion for a stay of voluntary departure. Pet. App. 27a. On September 6, 2006—13 days before the voluntary departure period granted by the BIA was to expire—the court of appeals entered a minute order granting petitioner's motion "to the extent that [petitioner's] period of voluntary departure is temporarily STAYED pending resolution of the motion." On September 19, 2006, the government filed a statement of non-opposition to petitioner's request for a stay of voluntary departure, stating that it "will not oppose [petitioner's] request for a stay of voluntary departure at this time," but noting that this action did "not constitute * * * a concession that [petitioner] has met her burden of proof for a stay of voluntary departure." See generally *Alimi* v. *Ashcroft*, 391 F.3d 888, 892-893 (7th Cir. 2004) (setting forth requirements for seeking a stay of voluntary departure from that court). On October 2, 2006, the court of appeals granted petitioner's September 5 motion, ordering that her "period of voluntary departure is STAYED pending resolution of all matters in this court." Pet. App. 27a-28a.

b. On October 15, 2007, the court of appeals issued an unpublished order that dismissed petitioner's petition

for review in relevant part. Pet. App. 1a-7a. Relying on its recent decision in *Ali* v. *Gonzales*, 502 F.3d 659 (7th Cir. 2007), petition for cert. pending, No. 07-798 (filed Dec. 12, 2007), and application for stay denied, No. 07A583 (Jan. 15, 2008), the court of appeals concluded that 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) "generally precludes judicial review of continuance decisions of immigration judges." Pet. App. 4a (quoting *Ali*, 502 F.3d at 660). The court further determined that petitioner's case did not fall "within the limited jurisdictional exception" that its cases had recognized for situations in which, absent a continuance, the government's own failure to act on a pending labor certification application would "effectively strip[] [an alien of her] eligibility to adjust status." *Id.* at 5a-6a. The court of appeals explained that because petitioner's "labor certification application was not pending when she sought a continuance," "it was not government inaction that cut off [petitioner's] eligibility to adjust status, but her lack of a viable labor certification application." *Id.* at 6a.

The court of appeals also viewed the IJ's decision as concluding that petitioner had not demonstrated that she was eligible for grandfathering under Section 1255(i). Pet. App. 6a-7a. Petitioner's "failure to mention that finding—let alone challenge it—either before the BIA or in her petition [for review]," the court determined, "waives any challenge to that aspect of the IJ's ruling." *Ibid.* And because of that "unchallenged finding," the court of appeals determined that "the denial of her request for a continuance does not arbitrarily strip [petitioner] of a Congressionally-conferred benefit," and thus "does not fall within [any] exception to the general bar against jurisdiction" to review an IJ's denial of a continuance. *Id.* at 7a.

c. On November 21, 2007, petitioner filed a petition for rehearing with a suggestion of rehearing en banc. See Pet. App. 25a. On December 27, 2007, the court of appeals denied rehearing. *Id.* at 25a-26a.

d. According to the court of appeals' clerk's office, the court's mandate issued on January 4, 2008, the day on which the court issued an agency closing letter.[2] That same day, petitioner filed with the court of appeals an application for a stay of voluntary departure pending resolution of a petition for a writ of certiorari. On January 7, 2008, the court of appeals denied that application.

5. On January 9, 2008, petitioner filed with this Court an application for a stay of voluntary departure (No. 07A576) pending the filing and disposition of a petition for a writ of certiorari. On January 14, 2008, the government filed its response in opposition to the stay application. Pet. App. 43a-67a. On January 15, 2008, Justice Stevens granted petitioner's stay application, ordering that her "period of voluntary departure will be stayed pending the timely filing and disposition of her petition for writ of certiorari" as well as during any proceedings on the merits. 07A576 Docket entry (Jan. 15, 2008).

ARGUMENT

Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) precluded it from reviewing the IJ's denial of her re-

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[2] Under Federal Rule of Appellate Procedure 41(b), a court of appeals' mandate "must issue * * * 7 calendar days after entry of an order denying a timely petition for panel rehearing," but "[t]he court may shorten or extend the time." Under the normal application of Rule 41(b), therefore, the court of appeals' mandate would have issued on January 3, 2008.

quest for a continuance of her removal proceedings. Pet. i, 1, 9-21. The courts of appeals have divided on that question, but review would be premature at this time. In any event, this case would not be a suitable vehicle for addressing the existing tensions in lower court authority. Petitioner has conceded removability, has no viable claim for adjustment of status under 8 U.S.C. 1255(i), and cannot show that the IJ abused his discretion in denying a continuance. In addition, petitioner's eligibility for adjustment of status—the only form of relief she requested a continuance to permit her to pursue—is contingent on the resolution of a threshold question that is not addressed in the petition for a writ of certiorari. The petition should thus be denied.

1. a. The federal courts of appeals are in conflict regarding whether they have jurisdiction under the INA to review an IJ's denial of a continuance. In the decision below, the Seventh Circuit adhered to its earlier decision in *Ali* v. *Gonzales*, 502 F.3d 659 (2007), petition for cert. pending, No. 07-798 (filed Dec. 12, 2007), and application for stay denied, No. 07A583 (Jan. 15, 2008), which held that 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) "generally precludes judicial review" of an IJ's discretionary decision to deny a request for a continuance in removal proceedings. Pet. App. 4a (quoting *Ali*, 502 F.3d at 660). The Eighth and Tenth Circuits have reached the same conclusion. See *Onyinkwa* v. *Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004); *Yerkovich* v. *Ashcroft*, 381 F.3d 990, 995 (10th Cir. 2004). Those courts have reasoned that an IJ's decision to grant or deny a request for a continuance is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii) (Supp.

V 2005), because it is based on regulations that the Attorney General promulgated to implement 8 U.S.C. 1229a(a) and (b), the statutory provisions authorizing IJs to conduct removal proceedings, and that in turn specify that the power to grant continuances is within the discretion of IJs. *Yerkovich*, 381 F.3d at 992-993; *Onyinkwa*, 376 F.3d at 799.

The majority of circuit courts have reached a contrary conclusion. The First, Second, Third, Fourth, Fifth, and Eleventh Circuits have all concluded that a decision by an IJ to grant or deny a continuance is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005), because an IJ's discretionary authority to act on a motion for a continuance is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Lendo* v. *Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar* v. *United States Attorney Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006); *Khan* v. *Attorney Gen. of the United States*, 448 F.3d 226, 232-233 (3d Cir. 2006); *Ahmed* v. *Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006); *Sanusi* v. *Gonzales*, 445 F.3d 193, 198-199 & n.8 (2d Cir. 2006) (per curiam).[3] The Sixth Circuit has reached the same result through

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[3] Although the Ninth Circuit has not issued a published decision addressing whether the INA bars judicial review of an IJ's discretionary denial of a continuance, it has agreed with the majority position in unpublished, nonprecedential opinions. See *Lim* v. *Mukasey*, No. 05-74594, 2007 WL 4562133 at *1 (Dec. 28, 2007); *Martinez* v. *Gonzales*, 166 Fed. App'x 300 (2006); see also *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528 (2004) (holding that Section 1252(a)(2)(B)(ii) does not preclude federal-court review of an IJ's denial of a motion to reopen).

a different analysis, concluding that "Section 1252(a)(2)(B)(ii) only applies to the portions of subchapter II left to the Attorney General's discretion, not the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to [the courts of appeals'] review." *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 632, 634 (2006).

b. As the government concluded over a year ago, after reexamining its prior position on the issue, the majority position represents the better reading of the statute. See generally Gov't C.A. Br., *Alsamhouri, supra* (No. 05-2800), discussed at p. 15, *infra*. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a continuance—be "specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005). Nothing in the relevant statutory "subchapter," however, mentions continuances, or "specifie[s]" that they may be granted "in the discretion of the Attorney General." *Ibid.* Rather, an IJ's authority to continue a case derives from regulations promulgated to implement statutory provisions that broadly authorize IJs to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. See, *e.g.*, 8 U.S.C. 1229a(a)(1). Given the general presumption in favor of judicial review, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii) (Supp. V 2005), the government agrees with the majority of circuit courts that an IJ's discretionary decision to deny a continuance is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005). The government did not argue otherwise to the court below. See Gov't C.A. Br. 9 n.1.

2. As discussed above, the courts of appeals are divided with respect to the underlying question upon which petitioner seeks review. Despite petitioner's contrary assertions (Pet. 9, 12 n.6, 19-21), however, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention and because the issue concerns a narrow issue of reviewability that is unlikely to affect the outcome of many cases.

Prior to December 2006, the government had taken the position that 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) precludes federal-court review of an IJ's denial of a continuance. In December 2006, in response to a petition for rehearing in *Alsamhouri* v. *Gonzales*, 484 F.3d 117 (1st Cir. 2007), the government reconsidered its position and concluded that the view of the majority of the courts of appeals is correct. See Gov't C.A. Br. at 7-13, *Alsamhouri*, *supra* (No. 05-2800). In *Alsamhouri*, the First Circuit initially had held that it "ha[d] no jurisdiction over whether the denial of a continuance was an abuse of discretion." *Alsamhouri* v. *Gonzales*, 458 F.3d 15, 16, withdrawn on petition for reh'g, 471 F.3d 209 (2006). In response to the government's change in position, the First Circuit reversed course, "adopt[ed] the majority rule," and held that it "ha[d] jurisdiction to review a denial of a continuance." *Alsamhouri*, 484 F.3d at 122. The Eighth Circuit, which has also adopted the minority position, has suggested that it may well reconsider its holding in light of the government's recent change in position. See *Ikenokwalu-White* v. *Gonzales*, 495 F.3d 919, 924 n.2 (2007) (suggesting that "it may be appropriate for our court to revisit this issue en banc" but noting that the "present case is [not] the most appropriate vehicle for doing so").

In *Ali*, which was decided less than a month before the Seventh Circuit's unpublished decision in this case, that court acknowledged the Attorney General's recent change in position, but stated that it "disagree[d]" with the Attorney General's view. 502 F.3d at 660. The opinion further stated that it had "been circulated among all judges of [that] Court in regular active service" and that "[a] majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges"; the opinion also noted, however, that four judges had voted to rehear the case en banc. *Id.* at 661 n.1.

Other developments in the Seventh Circuit since the issuance of the decision below suggest that the court may be willing to revisit the question presented en banc. On December 10, 2007, the Seventh Circuit issued an order directing the government to respond to a petition for rehearing en banc in *Potdar* v. *Keisler*, 505 F.3d 680 (2007). The threshold question raised by that petition is whether the panel erred in concluding that "it lacked jurisdiction under * * * [8 U.S.C.] 1252(a)(2)(B)(ii) to review a denial of a continuance requested by [the alien] to enable him to pursue an application for adjustment of status." Pet. on Reh'g at 1, *Potdar*, *supra* (No. 06-2441). On February 11, 2008, the government filed a response, in which it urged en banc rehearing on the issue of its jurisdiction over continuance denials. Resp. to Pet. on Reh'g at 8-13, *Potdar* (No. 06-2441) (Response).[4] There

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[4] The government's response did note, however, that there is a factual question in *Potdar* about whether the motion the IJ denied was actually a motion for a continuance. The panel in *Potdar* had held that the petitioner's motion to the IJ, which was styled a motion to terminate exclusion proceedings, "amounted to a request for a continuance" be-

accordingly is some prospect that the Seventh Circuit may reconsider its ruling on the question presented. It would thus be prudent for this Court to decline to resolve the disagreement in the circuit courts at this time.

There is, moreover, no pressing need for review by this Court because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only one procedural aspect of the conduct of removal proceedings. An IJ's denial of a motion for a continuance is reviewable by the Board only for abuse of discretion and requires a showing of substantial prejudice. *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006). The scope of any judicial review would be at least as deferential. The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The IJ manifestly did not abuse his discretion here in denying a motion for a continuance. See p. 18, *infra*. Nor is this case unusual in that respect: In fact, *all* of the previously cited decisions that found judicial review authorized, see pp. 13-14 & note 3, *supra*, *also* concluded that the denial of the alien's request for a continuance did not constitute grounds for overturning the IJ's decision. See *Lendo*, 493 F.3d at 442; *Alsamhouri*, 484 F.3d at 122; *Zafar*, 461 F.3d at 1362; *Khan*, 448 F.3d at 235; *Ahmed*, 447 F.3d at 438; *Sanusi*, 445 F.3d at 200; *Abu-*

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cause it "requested only an opportunity to pursue [adjustment of status] through appropriate administrative channels." 505 F.3d at 684-685. The government argued in its response to the rehearing petition that the panel erred in deeming the motion to terminate a motion for a continuance, Response at 6-8, but that if the court of appeals declines to revisit that issue, then the court should grant rehearing en banc on the question whether it has jurisdiction to review a continuance denial, *id.* at 8-13.

Khaliel, 436 F.3d at 634; *Lim*, 2007 WL 4562133 at *1; *Martinez*, 166 Fed. Appx. at 300. Review therefore is not warranted at this time.

3. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it, for at least three separate reasons.

a. The claim upon which petitioner sought to obtain review in the court of appeals—that the IJ abused his discretion in denying petitioner's request for a continuance—is meritless. Petitioner has conceded removability, Pet. App. 18a, and she has no entitlement to stay in this country illegally. *E.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). In addition, as the BIA explained, the IJ cited two independently sufficient bases for denying a further continuance. First, at the time she made her request, petitioner, despite already having had her removal hearing continued for more than seven months, was still unable to establish prima facie eligibility for adjustment of status or any non-speculative prospect of being able to do so. Pet. App. 8a-9a, 13a-14a. Second, the IJ also determined that petitioner would not merit a favorable exercise of discretion in any event because she had flagrantly violated the immigration laws by remaining in the United States illegally for nearly three years before even attempting to acquire some form of legal status. *Id.* at 9a, 13a, 14a. Because the IJ gave "a rational explanation" for his refusal to grant a continuance, and because that decision did not constitute an "inexplicabl[e] depart[ure] from established policies, or * * * rest[] on an impermissible basis," no abuse of discretion could be established here. *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 146 (7th Cir. 1993) (quoting *Cor-*

doba-Chaves v. *INS*, 946 F.2d 1244, 1246 (7th Cir. 1991)).

b. Moreover, any possible error in denying a continuance would have been harmless. In order to be properly "grandfathered" under Section 1255(i), petitioner would have needed to show that the initial labor certification application filed on her behalf was "approvable when filed." 8 C.F.R. 1245.10(a)(1)(i)(B); see 8 U.S.C. 1255(i)(1)(B)(ii). "[O]n the basic facts presented," which involved nothing more than a one-page acknowledgment letter stating that an application had been filed, the IJ stated that he was unable to "find that [applicant] is even * * * eligible" for grandfathering under Section 1255(i). Pet. App. 14a.; see *id.* at 20a-21a (stating that, as of the date of her final removal hearing, it would require "speculation" to conclude that petitioner was eligible for Section 1255(i) relief). As the court of appeals correctly determined, *id.* at 6a-7a, petitioner forfeited the ability to challenge the correctness of that determination by failing to challenge it before the BIA or the court of appeals.[5] Thus, because petitioner has no legitimate claim that would permit her to remain in the United States, this Court's plenary review is unwarranted.

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[5] As she did below, petitioner *presupposes* (Pet. 4-5) that, contrary to the IJ's determination, she was "grandfathered within the terms of Section [1255](i)" and was therefore eligible to adjust her status "on the basis of a new Labor Certification." But it was *petitioner's* burden to establish her prima facie eligibility for Section 1255(i) relief, and, as noted above, the IJ expressly found in his oral ruling that petitioner had failed to do so, Pet. App. 14a, and that is how the court of appeals viewed the IJ's decision, *id.* at 6a. Petitioner does not challenge the court of appeals' reading of the IJ's decision, or its waiver holding, in her petition for a writ of certiorari, and, in any event, those sorts of case-specific determinations would not merit this Court's review.

c. Regardless of whether petitioner would have been eligible for grandfathering under Section 1255(i), moreover, her eligibility for adjustment of status is also contingent on the resolution of another threshold issue that the petition for a writ of certiorari does not meaningfully address: whether a federal court has the authority to stay the expiration of a period of voluntary departure granted by the BIA. If the answer to that question is "no," petitioner's voluntary departure period has long since expired, and she is now statutorily ineligible for adjustment of status under Section 1255. See 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005).

The government's position is that reviewing courts lack the authority to stay the expiration of a voluntary departure period, much less to extend such a period beyond the outer time limits that Congress has expressly provided for such grants of discretionary relief.[6] With respect to aliens, such as petitioner, who are granted voluntary departure at the conclusion of removal proceedings, Congress has directed that "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). That strict time limitation on grants of voluntary departure reflects Congress's "intention to offer an alien a specific benefit—exemption from the ordinary bars on subsequent

[6] Although the government did not contest the court of appeals' power to grant a stay of voluntary departure in this case, the Seventh Circuit had previously issued a precedential decision holding that it has the authority to do so. See *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 654 (2004). As a result, the issue is properly before this Court. Cf. *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992). In addition, to the extent that the issue of whether a court of appeals may stay the expiration of a voluntary departure period implicates a question of "adjudicatory authority," *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004), the Court would be required to consider it *sua sponte* in any event.

relief—in return for a quick departure at no cost to the government." *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004). Because the BIA already granted petitioner 60 days in which to depart voluntarily, see Pet. App. 9a-10a, any further extension of that period would exceed Congress's clear mandate.[7]

In addition, the INA and its accompanying regulations make clear that, like the power to grant voluntary departure in the first place, see 8 U.S.C. 1229c(a)(1) and (b)(1), the ability to extend an initial period of voluntary departure is vested exclusively in the Executive Branch. Whereas Congress has expressly authorized courts to order a stay of an alien's physical removal pending consideration of a petition for judicial review, see 8 U.S.C. 1252(b)(3)(B), it conferred no comparable authority to grant stays of a period of voluntary departure. To the contrary, the INA has provided since 1996 that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure * * * nor shall any court order a stay of an alien's removal

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[7] The INA makes clear that an alien's decision to seek judicial relief by way of a petition for review does not by itself stay or otherwise extend the period during which a grant of permission to depart voluntarily remains valid. Whereas the filing of an administrative appeal to the BIA prevents an IJ's decision from becoming final and thus prevents the commencement of a voluntary departure period, see 8 U.S.C. 1101(a)(47)(B)(i), 1229c(b)(1), an order by the BIA is final when issued, see 8 U.S.C. 1101(a)(47)(B)(i), even where (unlike here) a motion to reopen was filed, see *Stone* v. *INS*, 514 U.S. 386 (1995). In addition, Congress has declared that the filing of a petition for review with a court does not, by itself, stay even an alien's physical removal from the United States. See 8 U.S.C. 1252(b)(3)(B) ("Service of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.").

pending consideration of any claim with respect to voluntary departure." 8 U.S.C. 1229c(f). The INA further expressly provides, in its judicial review section, that "[n]otwitstanding any other provision of law (statutory or nonstatutory), including * * * sections 1361 and 1651 of [Title 28], * * * no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under" the provisions authorizing voluntary departure. 8 U.S.C. 1252(a)(2)(B)(i) (2000 & Supp. V 2005). A stay of a grant of voluntary departure would necessarily entail prohibited "review" of that relief.

Moreover, a stay is granted by a court only in aid of its jurisdiction to review the merits of whatever it has stayed. See, *e.g.*, 28 U.S.C. 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). For that reason as well, because a court may not review an administrative determination concerning the granting of voluntary departure, it may not stay the running of a voluntary departure period. Section 1252(a)(2)(B)(i) thus further refutes any suggestion that Congress intended for courts to be able to extend a voluntary departure period, which was permitted by the Attorney General in the first place only as a matter of discretion, simply by issuing a stay. *Ngarurih*, 371 F.3d at 193. In addition, regulations issued under the INA provide that "[a]uthority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of" certain specified DHS officials. 8 C.F.R. 1240.26(f); see *ibid.* (providing that "[i]n no event can the total period of time, including any extension, exceed

120 days or 60 days as set forth in [8 U.S.C. 1229c (2000 & Supp. V 2005)]").[8]

As the government noted in its memorandum in opposition to petitioner's application for a stay of voluntary departure (Pet. App. 54a), the courts of appeals are divided with respect to whether they have the authority to stay the running of a voluntary departure period granted by the BIA. A majority of the courts of appeals have concluded that they do have such authority, at least in situations in which the request to do so is made before the voluntary departure period expires.[9] In contrast, the Fourth Circuit has held that a court of appeals lacks the power to stay or otherwise extend the period during which an alien's permission to depart voluntarily remains valid. *Ngarurih*, 371 F.3d at 194. That conflict in lower-court authority may itself warrant this Court's

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[8] The fact that courts may not stay the running of a voluntary departure period does not prevent aliens such as petitioner from obtaining judicial review of any substantive challenge that they may have to the underlying removal order. In 1996, Congress repealed a provision that had barred courts from reviewing final deportation orders of aliens who had already departed or been removed from the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). As a result, under current practice, an alien may comply with the terms of a voluntary departure order without forfeiting his ability to obtain judicial review of the underlying alternate removal order, see *Ngarurih*, 371 F.3d at 192-193, and this would remain true under the regulations recently proposed by the Attorney General, see note 10, *infra* (discussing proposed regulations).

[9] See *Bocova* v. *Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa* v. *Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale* v. *Attorney Gen.*, 453 F.3d 151, 157 (3d Cir. 2006); *Vidal* v. *Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma* v. *Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez*, 383 F.3d at 654; *Rife* v. *Ashcroft*, 374 F.3d 606, 615-616 (8th Cir. 2004); *El Himri* v. *Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003).

plenary review in an appropriate case, though a recently proposed rule may limit the issue's importance going forward.[10] It should not, however, be resolved in the absence of full briefing by both parties, and in the context of a petition for a writ of certiorari that seeks to obtain plenary review solely with respect to an entirely unrelated question of immigration procedure that does not warrant review for the various reasons set out above.

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[10] On November 30, 2007, the Attorney General issued a proposed regluation addressing a number of issues related to voluntary departure. 72 Fed. Reg. 67,674. The proposed rule would expressly provide that an alien's filing of a petition for judicial review "prior to the expiration of the voluntary departure period will have the effect of automatically terminating the grant of voluntary departure." *Ibid.*; Gov't Br. 47, *Dada* v. *Mukasey*, No. 06-1181 (argued Jan. 8, 2008). Under this proposed rule, therefore, issues regarding judicial stays of voluntary departure periods would not arise.

The comment period for the proposed rule closed on January 29, 2008, and the Department of Justice is currently considering the comments. The proposed rule would "app[ly] prospectively only, that is, only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure." 72 Fed. Reg. at 67,682. But the rule, if it becomes final, would eliminate the need for this Court to resolve whether, in the absence of a such a rule, the courts of appeals possess the authority to stay the running of a voluntary departure period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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